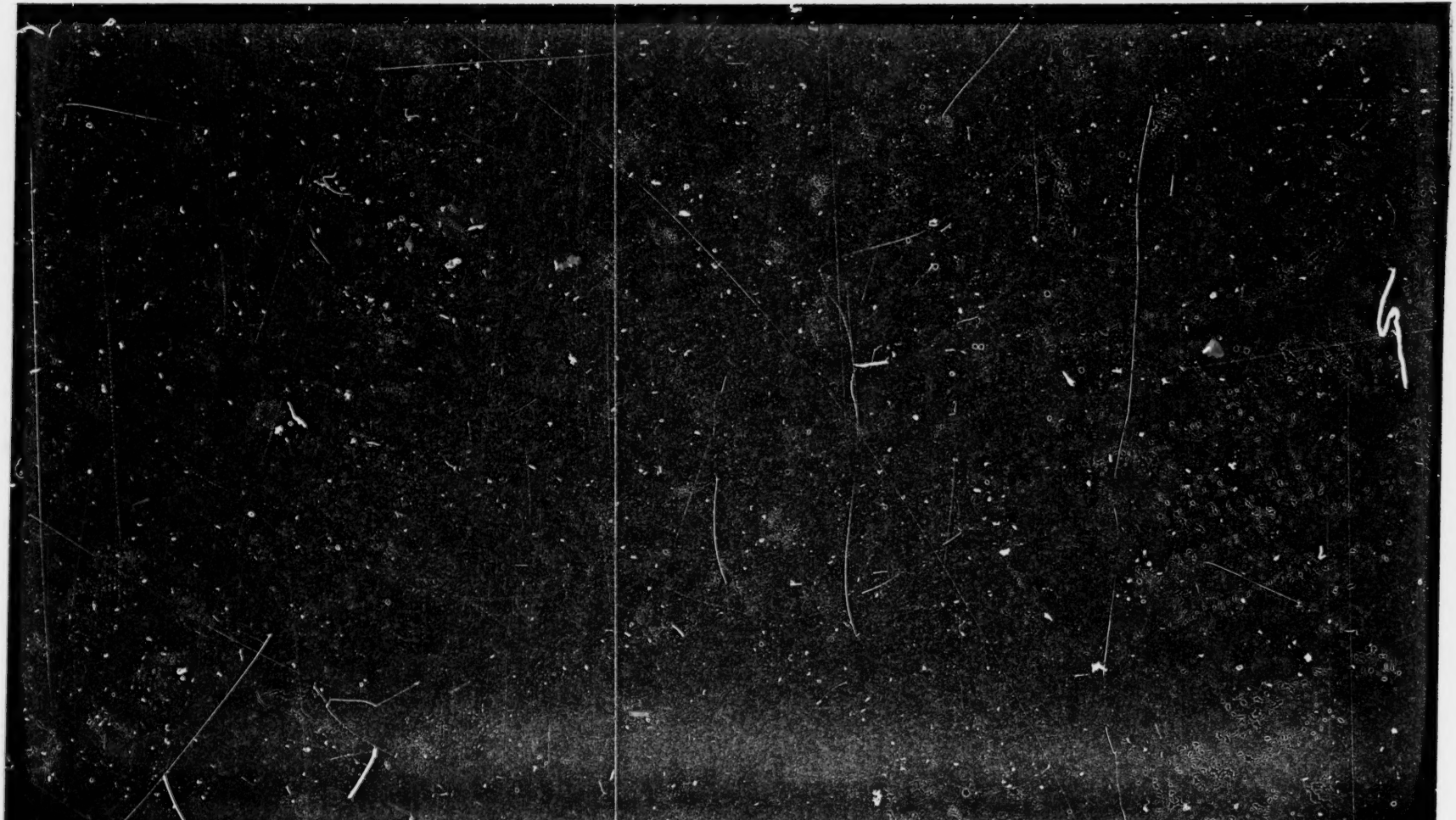

STATUTES INVOLVED

5 U.S.C. 1009.

"* * * the reviewing court shall decide all relevant questions of law * * * It shall * * * hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence * * *; (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the record * * *"

42 U.S.C. 1651.

Compensation authorized—places of employment.

a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment,

(1) at any military, air or naval base acquired after January 1, 1940, by the United States from any foreign government.

33 U.S.C. 920.

Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary,

a) That the claim comes within the provisions of this chapter.

c) That the injury was not occasioned solely by the intoxication of the injured employee.

d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

33 U.S.C. 903.

Coverage.

b) No Compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

33 U.S.C. 921(b).

Review of compensation orders.

b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred.

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

Opinion of the Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 18897

UNITED STATES OF AMERICA and
JEANETTE E. GONDECK, Intervenor,
Appellants,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED,
and THE TRAVELERS INSURANCE COMPANY,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(February 9, 1962)

Before JONES and BELL, Circuit Judges, and SIMPSON, District Judge

JONES, Circuit Judge: The district court set aside an order of William M. O'Keeffe, Deputy Commissioner, Department of Labor, by which compensation was awarded to Jeanette E. Gondeck for the death of her husband, Frank J. Gondeck, pursuant to the provisions of the Defense Base Compensation Act, 42 U.S.C.A., § 1651 et seq. By this statute the employees under it were covered by the provisions of the Longshoremen's and Harbor Work-

ers' Compensation Act, 33 U.S.C.A., § 901 et seq. The evidentiary facts are stipulated. The inferences drawn from the stipulated facts by the Deputy Commissioner and his findings are challenged.

Frank J. Gondeck, a Florida resident, was employed by Pan American World Airways in March, 1958, as a diesel generator operator at a defense base on San Salvador Island, British West Indies. His work required him to put in an eight-hour shift on the job after which he was off twenty-four hours. He was subject to call for emergencies when off duty. He lived at a dormitory on the Base. There was a recreation center on the Base known as the Reef Club. At Cockburn Town, about three miles from the Base, was a night club known as the Blue Marlin Club. Pan American operated a bus on a regular schedule for transporting its employees, without charge, between the Base and the town. Pan American supplied a jeep for transporting the diesel operators to and from the several generating plants.

Gondeck went off duty at 4:00 o'clock on the afternoon of April 24, 1958. With seven or eight other employees he went to the Reef Club where they sat around drinking champagne, with time out for chow, until about 7:30 o'clock in the evening when Gondeck, in the company of James F. Norman, Fox F. Fry and R. M. Smith, took off in the jeep for town. They went to the Blue Marlin, a native club, where they stayed for about fifteen minutes, had a beer, and started back to the Base with Norman driving the jeep. The use of the jeep for personal missions of employees was forbidden by Pan American. Norman and Smith had been warned a few days earlier that the jeep was not to be used except for official business. It was not shown whether this was known by Gondeck. As the jeep approached the gate to the Base, it went out of control,

skidded, and turned over. Smith was killed. Gondeck sustained brain injuries from which he died three days later. In his order making an award of compensation the Deputy Commissioner found, among other things, that Gondeck had completed his day's work and was, on the journey to Cockburn Town, seeking reasonable recreation and entertainment, that he was on call for emergency duty. An award was made to the widow for herself and the child of the decedent by the Deputy Commissioner against Pan American and Travelers Insurance Company, its compensation insurance carrier.

Pan American and the Travelers Insurance Company brought suit against the Deputy Commissioner to set aside the award and to enjoin its enforcement. The United States Attorney represented the Deputy Commissioner in the litigation. Jeanette E. Gondeck intervened. On September 15, 1960 (and here the dates begin to become important), the district court made and filed findings of fact and conclusions of law in which it was stated that there was no substantial evidence that Gondeck was engaged in the scope of his employment at the time of his injury or that his injury and subsequent death arose out of or in the course of his employment. It was concluded that the award should be set aside. On September 21, 1960, the Deputy Commissioner filed a motion to amend the findings and conclusions or for a new trial. On September 26, 1960, Mrs. Gondeck filed a similar motion. The court's judgment setting aside the award and enjoining its enforcement was dated November 7, 1960, and filed on the following day, November 8, 1960. On November 16, 1960, orders were entered denying the two motions. On January 13, 1961, the United States, which was never a party to the suit, filed a notice of appeal, not from the judgment, but from the order "denying Motion to Amend Findings of Fact and Conclusions of Law and denying Motion for New

Trial." On January 13, 1961, the intervenor filed a notice of appeal from the final judgment of November 8, 1960, and the order of November 16, 1960. The appellees have moved to dismiss the appeal of the United States on the ground that it was not and is not a party and has no right to appeal, that the order on the motion for which it attempts to appeal is not a final order and that the appeal was not taken within the time permitted by the rules. The appellees also move to dismiss the appeal by the intervenor on the ground that her appeal was not taken within the prescribed time.

We think there must be a dismissal of what purports to be an appeal of the United States. It was not a party to the proceedings in the district court and would not have been a proper party had it sought to become one. The identity of the United States and of the Deputy Commissioner are separate. No notice of appeal was filed by the Deputy Commissioner although the United States Attorney filed in his name a statement of "points on appeal" and a designation of the record on appeal. These do not make an appellant out of either the United States or the Deputy Commissioner. These matters do not preclude the intervenor, Jeanette E. Gondeck, from taking an appeal by the timely filing of a notice of appeal. Whether she has done so is one of the questions for our decision.

The appeal of the intervenor was, we conclude, taken within the prescribed time. The running of the time for taking an appeal is suspended until disposition is made of a timely motion to amend or make additional findings of fact. Rule 73 (a), Fed. Rules Civ. Proc., 28 U.S.C.A. Where, as in the case here, the motion presented a substantial question and the motion is not disposed of either expressly or by necessary implication, by the judgment, the rule is applicable although the motion was made be-

fore but not overruled until after the judgment. *Phinney* v. *Houston Oil Field Material Co.*, 5th Cir., 1958, 252 F. 2d 357; *Partridge* v. *Presley*, 88 U.S. App. D.C. 298, 189 F. 2d 645, cert. den. 342 U.S. 850, 72 S. Ct. 79, 96 L. Ed. 642. Cf. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 65 S. Ct. 254, 89 L. Ed. 160. The order on the motion was entered November 16, 1960. The Intervenor's notice of appeal was filed on January 13, 1961. The Deputy Commissioner was an officer of the United States and therefore the time of taking an appeal was sixty days as to all parties, including the intervenor. 28 U.S.C.A., § 2107, Rule 73 (a) supra.

The intervenor-appellant asserts that "In the absence of a finding that Gondeck was injured and killed within the terms of Sec. 903 (b),[1] the award must be reinstated. This is not an accurate statement, at least since the passage of the Administrative Procedure Act,[2] of the principle governing a judicial review of an administrative determination. The findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456. The intervenor urges the proposition that Gondeck was entitled to seek recreation away from the base where he was employed as an incident of his employment and, having received the injuries resulting in his death in returning from a recreational excursion, it follows that death benefits under the Act are payable. The doctrines applicable cannot be stated by such a broad

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1. No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. 33 U.S.C.A., § 903(b).

2. 5 U.S.C.A. §§ 1001-1011.

theorem. Professor Larson, thus announces the general principles:

> "Recreational or social activities are within the course of employment when
>
> "(a) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> "(b) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> "(c) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." 1 Larson's Workmen's Compensation Law 328, § 22.00.

The stated tests are not here met. We do not think it can be said that the employer sponsored the activity of going to Cockburn Town for recreation because it furnished free bus service between the town and the base. If such sponsorship could be inferred it would not inhere in an expedition made in the employer's jeep which the employees were prohibited from using for such purposes. The intervenor contends that Gondeck was subject to call at all times and that this, in some manner made his fatal injury an occurrence in the course of employment. The premise is unsupported and it is the Deputy Commissioner's finding that Gondeck was injured and killed "when, having completed his day's work" he journeyed to town, drank a beer, and was returning to his quarters. The injury did not occur on the employer's premises nor during the employee's working time. The injury and death of Gondeck were wholly disassociated from his employment environment. He had not been using recreational facilities

furnished by the employer nor did he use the means of travel to and from the place of recreation furnished by the employer. No benefit to the employer has been shown to result from the going by Gondeck to a native club for a beer unless it be for the intangible and, we think, immaterial benefit of improvement of morale that might be the consequence of such an excursion. The trip cannot be regarded as necessary travel to and from work. We find no evidence that furnishes a link by which the activity in which Gondeck was engaged was related to his employment. Larson, supra, 328-342, §§ 22.00-22.30; 99 C.J.S. 737 et seq., Workmen's Compensation, § 221 c; 58 Am. Jur. 743; Workmen's Compensation § 237; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, supra; *Ward* v. *Cardillo*, D.C. Cir. 1943, 77 App. D.C. 343, 135 F.2d 260; *N. L. Demara* v. *Employers Liability Assurance Corp.*, 5th Cir. 1953, 250 F.2d 799, cert. den. 358 U.S. 845, 79 S. Ct. 69, 3 L. Ed. 2d 79; *National Surety Corporation* v. *Bonds*, 5th Cir. 1960, 275 F.2d 389, cert. den. 364 U.S. 849, 81 S. Ct. 93, 5 L. Ed. 2d 73; *Brown-Pacific-Maxon, Inc.*, v. *Pillsbury*, D.C.N.D. Calif. 1953, 132 F. Supp. 421.

The appeal of the United States will be DISMISSED.

The judgment of the District Court setting aside and enjoining the enforcement of the Deputy Commissioner's order is

AFFIRMED.

Judgment of the Court of Appeals

Extract from the Minutes of February 9, 1962.

No. 18897

UNITED STATES OF AMERICA and JEANETTE E. GONDECK,
Intervenor,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED, and THE TRAVELERS INSURANCE COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal of the United States in this cause be, and it is hereby, dismissed; and that the judgment of the District Court setting aside and enjoining the enforcement of the Deputy Commissioner's order be, and it is hereby, affirmed.

* * *

[Title Omitted]

Findings of Fact and Conclusions of Law of District Court

This matter having come on before the Court on the motions for summary judgment and for review of the findings of the Deputy Commissioner upon the parties stipulated record for review, and the Court having examined the record, the pleadings herein and the briefs of counsel and, being fully informed in the premises, the Court thereupon enters its Findings of Fact and Conclusions of Law,

FACTS SUPPORTED BY SUBSTANTIAL EVIDENCE

1. The plaintiffs, Pan American World Airways, Inc. (Pan Am), and The Travelers Insurance Company, brought this action to review the findings of the defendant, William M. O'Keeffe, Deputy Commissioner, Sixth Compensation District (Deputy) granting an award to Jeanette E. Gondeck, the widow of Frank J. Gondeck, an employee of the plaintiff Pan Am.

2. Frank J. Gondeck, according to the undisputed, stipulated facts of record in this case, was, on April 24, 1958, an employee of Pan Am on San Salvador Island, British West Indies, having been transported there, fed and housed while there, at his employer's expense.

3. On April 24, 1958, Gondeck completed his scheduled eight-hour shift, came off duty, returned to his quarters, cleaned up, availed himself to some extent of the employer furnished recreation facilities on the base, drank some alcoholic beverage of unspecified amount (apparently not in excess), left the employer's government base in the company of several fellow employees in a company-owned jeep, the use of which had been denied employees for other than company business, in contravention of the employer's regulations, and despite the fact that the employer had furnished scheduled bus transportation to Cockburn Town, this party's destination.

4. Having arrived at Cockburn Town via the company jeep, Gondeck and his companions had a "Beer" at a native tavern, and, again contrary to company orders, picked up a native to give him a ride back to the base; on the return trip, before reaching the base, the jeep overturned seriously injuring Gondeck, from which injuries Gondeck died several days later.

5. The decedent was subject to call at all times in any emergency, but, not only was he not on call, nor on active duty, nor on any business in any way connected with his employment, but he and his companions were at the time of the injury, actively engaged solely in a pleasure trip of their own and in violation of two of their employers regulations regarding the jeep in which they were injured.

6. In a careful review of this record this Court is not only unable to discover any substantial evidence to support the findings of the Deputy, but it is unable to find any evidence in support of the findings before it for review.

7. The decedent's widow, Jeannette E. Gondeck, was allowed to intervene herein in support of the Deputy's award.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter of this case pursuant to the provisions of Title 33, U.S.C., Section 921, and Title 42, U.S.C., Section 1653, as made applicable to this case by Title 42, U.S.C., Section 1651.

2. The decedent-employee, Frank J. Gondeck, at the time of his death was an employee within the provisions of the Defense Bases Compensation Act.

3. The record contains no substantial evidence to support the Deputy's implicit finding that the decedent was engaged within the scope of his employment or that his injury and subsquent death arose out of or in the course of his employment.

4. There being no substantial evidence to support the findings of the Deputy, said findings are erroneous

and should be reversed and remanded for proceeding consistent with the decision of this Court.

Upon presentation of a final order in conformity with these Findings and Conclusions of Law, Judgment will be entered herein.

Dated at Miami, Florida, this 15th day of September, 1960.

/s/ EMETT C. CHOATE
United States District Judge

[Title Omitted]

Final Judgment of District Court

THIS CAUSE having come on before the Court on the Complaint of the Plaintiffs to enjoin a Compensation Order entered by the Defendant WILLIAM M. O'KEEFFE, Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, and Answers having been filed by the Defendant and by the widow of the deceased Employee who petitioned for leave to intervene and who was permitted so to do, and the Court having examined the Record, and Briefs having been submitted, and the Court having heretofore on September 15, 1960, entered its Findings of Fact and Conclusions of Law, and the Record containing no substantial evidence to support the Findings of the Deputy Commissioner and said Findings being not in accordance with the law it is

ORDERED, ADJUDGED AND DECREED that:

1. The Compensation Order of WILLIAM M. O'KEEFFE, Deputy Commissioner, Sixth Compensation District, dated December 31, 1959, bearing File No. DB-C-773-373 awarding compensation to Jeanette E. Gondeck and Barbara Ann Gondeck, respectively the surviving

spouse and child of Frank J. Gondeck, deceased, be and the same hereby is suspended and set aside in whole;

2. A permanent injunction be and it hereby does issue against the said Deputy Commissioner, his officers, agents and employees, restraining enforcement of the aforesaid Order, permanently;

3. The aforesaid Deputy Commissioner be and he is hereby directed to set aside the said Order and enter an Order dismissing the claim.

DONE AND ODERED in the City of Miami, Dade County, Florida, on this 7th day of November, 1960.

EMETT C. CHOATE

District Judge

[Title Omitted]

Compensation Order of Deputy Commissioner

Such investigation in respect to the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 24th day of April, 1958, the decedent herein, Frank J. Gondeck, of 1200 Northeast 144th Street, Miami, Florida, was in the employ of the employer herein, Pan American World Airways, Incorporated, of Post Office Box 4187, Patrick Air Force Base, Florida, a contractor with the United States at San Salvador Air Force Base, San Salvador Island, British West Indies, in the Caribbean Compensation District, established under the provisions of the Defense Base Compensation Act (Public Law 208—77th Congress as amended), and that the

liability of the employer for compensation under the said Act was insured by The Travelers Insurance Company; that the case was transferred to the Sixth Compensation District in accordance with Section 19 (g) of the said Act with the approval of the Bureau of Employees' Compensation; that on the said day the decedent herein sustained personal injury resulting in his disability and subsequent death when, having completed his day's work and seeking reasonable recreation and entertainment, the decedent journeyed to Cockburn Town, a native village on San Salvador Island, British West Indies, drank one glass of beer, rode in a jeep back toward the decedent's living quarters, and the jeep overturned on the road, which resulted in a fracture of the decedent's skull and an epidural hemorrhage; that the decedent was paid in full for the day of the accident and died on April 27, 1958, as a result of the injuries sustained on April 24, 1958; that temporary total disability did not extend beyond the three-day waiting period; that the decedent was a passenger in a jeep being driven by another person when the accident occurred; that intoxication of the decedent was not the sole cause of the accident; that the decedent was on call for emergency duty by the employer herein twenty-four hours per day as long as the decedent was on the island; that the decedent did not remove himself from a possible emergency call to duty on the day of the accident; that the employer provided the decedent with food and lodging as well as pay; that the employer knew the decedent and co-employees journeyed regularly to Cockburn Town for recreation and entertainment; that the employer to make the recreation and entertainment found in Cockburn Town more readily available to the decedent and other employees provided the employees with free transportation to Cockburn Town; that written notice of the injury and subsequent death was not given to the em-

ployer within thirty days, but the employer had knowledge of the injury and subsequent death and has not been prejudiced by lack of such written notice; that the employer provided the decedent with medical treatment, etc., in accordance with the provisions of Section 7 (a) of the said Act; that the average weekly wage of the decedent herein at the time of the injury amounted to more than $81.00; that the claimant herein, Jeanette E. Gondeck, who was born on April 26, 1913, and married to the decedent on May 3, 1932, is the surviving widow of the decedent herein, Frank J. Gondeck, and is entitled to death benefits for herself at $28.35 per week (35% of the maximum average weekly wage of $81.00); that Barbara Ann Gondeck, who was born on August 29, 1940, is the surviving child of the decedent herein, Frank J. Gondeck, and that Jeanette E. Gondeck, mother and natural guardian of the child, is entitled to death benefits for the support of the said child at $12.15 per week (15% of the maximum average weekly wage of $81.00); that the surviving child, Barbara Ann Gondeck attained the age of eighteen years on August 29, 1958; that the funeral expenses of the decedent amounting to $1,083.05 were paid by the claimant, Jeanette E. Gondeck, and she is entitled to reimbursement in the sum of $400.00 on account of such expenditures; that the accrued death benefits to which Jeanette E. Gondeck is entitled for the support of the said child from April 27, 1958, to August 28, 1958, inclusive, is 17 5/7th weeks at $12.15 per week in the amount of $215.23; that the accrued benefits to which Jeanette E. Gondeck is entitled to for herself as the surviving widow from April 27, 1958 to December 30, 1959, inclusive (87 4/7th weeks at $28.35 per week), amount to $2,482.65; that the total accrued death benefits to which Jeanette E. Gondeck is entitled to for herself and for the support of the said child to December 30, 1959, inclusive, amounts to

$2,697.88; that the employer and the insurance carrier have paid nothing to the claimant as compensation; that the services and expenses of Thomas G. Spicer and Gay, Hyman and Anderson, Attorneys for the claimant, were necessary and the reasonable value of such services and expenses is $500.00.

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer herein, Pan American World Airways, Incorporated, and the insurance carrier herein, The Travelers Insurance Company, shall pay to the claimant herein, Jeanette E. Gondeck, of 1200 Northeast 144th Street, Miami, Florida, death benefits as follows: 17 5/7th weeks at $12.15 per week for the support of Barbara Ann Gondeck, surviving child of the decedent, Frank J. Gondeck, from April 27, 1958, to August 28, 1958, inclusive, which is $215.23, and 87 4/7th weeks at $28.35 per week from April 27, 1958, to December 30, 1959, inclusive, which is $2,482.65 for death benefits due the widow, a total amount of $2,697.88 for death benefits to December 30, 1959, inclusive, all of which has accrued and the employer and the insurance carrier are directed to pay forthwith in one sum, less attorneys' fees hereinafter provided, and to continue payments thereafter in bi-weekly installments at $28.35 per week to Jeanette E. Gondeck, surviving widow of the decedent, Frank J. Gondeck, subject to the limitations of the said Act, or until otherwise ordered.

The employer herein and the insurance carrier herein are also directed to pay the sum of $400.00 to the claimant, Jeanette E. Gondeck, as reimbursement for funeral expenses.

A fee in the sum of $500.00 for services and expenses rendered on behalf of the claimant is hereby approved in favor of Thomas G. Spicer, Attorney, 819 Seybold Building, Miami, Florida, and Gay, Hyman and Anderson, Attorneys, 913 Ainsley Building, Miami, Florida, and made a lien on the accrued death benefits.

Given under my hand at Jacksonville, Florida, this 31st day of December, 1959.

(Sgd.) WILLIAM M. O'KEEFFE

William M. O'Keeffe, Deputy Commissioner
Sixth Compensation District.